EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fair Isaac Corporation, a Delaware Corporation, Plaintiff, v. Federal Insurance Company, an Indiana corporation, and ACE American Insurance Company, a Pennsylvania Corporation, Defendants.	File No. 16-cv-1054(DTS) Courtroom 9E Minneapolis, Minnesota Wednesday, May 24, 2023 1:00 p.m.

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography; transcript produced by computer.

* * *

APPEARANCES:

For Plaintiff:

MERCHANT & GOULD P.C.
BY: ALLEN W. HINDERAKER
HEATHER J. KLIEBENSTEIN
PAIGE S. STRADLEY
MICHAEL A. ERBELE
JOSEPH W. DUBIS
150 South Fifth Street, #2200
Minneapolis, Minnesota 55402

For Defendants:

FREDRIKSON & BYRON
BY: TERRENCE J. FLEMING
LEAH C. JANUS
200 South Sixth Street, #4000
Minneapolis, Minnesota 55402

O'MELVENY & MYERS LLP
BY: LEAH GODESKY
ANTON METLITSKY
Times Square Tower
7 Times Square
New York, New York 10036

Court Reporter:

RENEE A. ROGGE, RMR-CRR
United States District Courthouse
300 South Fourth Street, Box 1005
Minneapolis, Minnesota 55415

* * *

P R O C E E D I N G S

IN OPEN COURT

THE COURT: All right. Good afternoon. We are on the record in the matter of First Isaac Corporation versus Federal Insurance Company, et al., Civil Number 16-1054.

Counsel for FICO, if you will note your appearances, please.

MR. FLEMING: Your Honor, Allen Hinderaker, Heather Kliebenstein, Joe Dubis, Michael Erbele and Paige Stradley from Merchant & Gould. And Mr. Jim Woodward, vice president and associate general counsel for FICO.

THE COURT: All right. Good afternoon to the six of you.

Counsel for Federal, et al., if you will note your appearances, please.

MS. GODESKY: Good afternoon, Your Honor. Leah Godesky from O'Melveny for the defendants.

MR. METLITSKY: Anton Metlitsky from O'Melveny for the defendants.

MS. JANUS: Leah Janus, Fredrikson & Byron, for the defendants.

MR. FLEMING: Terry Flemming, Fredrikson & Byron, for the defendants.

THE COURT: All right. Good afternoon to the four of you.

So I've read everything. And just letting you know, I have a hard stop at 2:30, which in my estimation ought to be enough time, in any event. I am going to take up the motion for a new trial on actual damages first.

Ms. Godesky, if you want to come on up or whomever is arguing. I will tell you you get 15 minutes.

MR. METLITSKY: Okay.

THE COURT: Okay? And here's some of which I'm going to take up. Okay?

MR. METLITSKY: I figured --

THE COURT: Yeah. So here's the issue, I guess, as I see it. You're making in different language two arguments, it seems to me. One, that the scope of the evidence that the court allowed on the question of actual damages was wrong and that, regardless of that, the plaintiffs and/or their witness or the court's admission of certain charts exceeded that scope, in any event.

Generally correct?

MR. METLITSKY: Basically. I mean, we are making those arguments. You know, we made these evidentiary arguments at trial. We still think they're right. But our argument doesn't depend on us being right about them.

THE COURT: Okay. Well, here's -- well, let me ask you this. In her summary judgment order, Judge Wright said, and we all know what she said, at page 31 and 32,

"Although some of the facts underlying Zoltowski's opinion may be relevant in the calculation of a hypothetical lost license fee, his selective application of those facts to his calculation leads to a subjective and unreliable result."

MR. METLITSKY: Right.

THE COURT: Here's my question. I read that and I read that at the time to say, among other things, that the application-based pricing methodology was some, if not all, of the evidence that she said might be relevant.

So first question to you, Do you see that a different way?

MR. METLITSKY: I mean, I think what matters is the evidence that came in at trial. Right? That was the summary judgment evidence. I'm not sure what was in Judge Wright's head. All I know is what happened at trial. And what happened at trial is Mr. Waid testified about this methodology that had never been reflected in any actual license. And that just seems to me to be sort of the definition of, This is what I would, you know, want to charge.

The court held -- heard the testimony just like the rest of us did, and it was not based on any actual real world benchmark. It was just testimony about what Mr. Waid in this hypothetical role that had never existed in the real world would have, I don't know, done, I guess. So that

seems inadmissible to me, but --

THE COURT: Well, understood. You know, what I'm getting at, frankly, just sort of a -- I don't know if it's a threshold issue, but what I'm getting at is it seemed to me that it would be hard to read Judge Wright's statement as not referencing the hypothetical -- or the application-based pricing methodology, number one, point one, and, point two, may only reference that.

But if that's the case -- as I'd indicated, I wasn't going to revisit that decision; but if that's the case that she's saying this gets to come in to the extent it bears on the hypothetical negotiation, I don't know how that comes in to the extent you are suggesting otherwise without numbers, because then if it doesn't come in with numbers attached to it, it's utterly meaningless.

MR. METLITSKY: Well, I think, I think it could come in if there were some real world basis for thinking that it's something that could actually happen. It's tied to a real world market value rather than just what FICO would like to do. Right? I mean, this was at summary judgment. Right? You have to lay foundation at trial, and you have to actually demonstrate that the evidence that you are proffering at trial is, you know, relevant under the legal standard.

THE COURT: The foundation I heard him to lay for

it was that this application-based pricing model has existed since, whenever, I mean, early 2000s. I don't recall now if it was 2003 or 2006, but that it's existed, that it's -- I think that it was published, that they have always had it. I don't know that he tied it this directly to the one application-based price that was introduced at trial, but, you know -- and then he cabined all that with, This is just the starting point for how we would approach the negotiation.

MR. METLITSKY: Right, it was just the starting point. And the jury picked a number that was higher than his starting point, but I'll get to that in a second. But I guess it's true that there was some application-based pricing for licenses that used like one application.

But the testimony at trial, Mr. Waid admitted that at least at the time -- this is 1825-26 of the transcript -- when you had more than two or three, it was always enterprise-wide; and when you had 15 -- he admitted that he'd never seen an application-based license for 15.

So that's what I mean. There was never, ever a license like this using an application-based methodology, and that I think is an evidentiary problem. But even if it's not an evidentiary problem, it is certainly a problem of proof. Right? Even if it -- that's why I'm saying it doesn't, our argument doesn't -- we automatically win if

we're right about the evidentiary argument, right, because then there's just no evidence. But even if the evidence is relevant in some sense, it's only relevant to the seller's side of, you know, whatever this hypothetical negotiation is and --

THE COURT: Well, right, grant you that.

MR. METLITSKY: Right.

THE COURT: But doesn't each side get to say, Look, here's how we would approach it. And the defendant can say, Well, we would approach it this way, and that's been our experience. And the jury is left to figure out what would reasonable parties do in this circumstance --

MR. METLITSKY: Yes.

THE COURT: -- and what would they have reasonably negotiated.

MR. METLITSKY: Well, I don't -- so I don't think so, and I'll tell you why in a second. But even if that's right, the jury's verdict still has to be rational. We know the jury's verdict here could not possibly have been rational, because the hypothetical negotiation that you have to posit is, Mr. Waid said 36 and a half million dollars, and my client said, Well, that's just too generous, I really need to offer you 40, because otherwise I wouldn't feel right about it. I mean, what kind of negotiation would work like that?

But in our submission, as you know, in our briefs, we think the actual evidence, the objective evidence couldn't support anything higher than a few million dollars. And the reason I think we're right about it under the legal standard, even if this other evidence was reasonable, is because all the cases say, I'm just quoting from the *Oracle* case, for example, in the Ninth Circuit, that the purported hypothetical license values have -- it can't be, quote, "unconstrained by reality." Right?

So the *Gaylord* case out of the Federal Circuit says the particular practices of the parties can't by themselves support the hypothetical license value. They can't be unrealistically exaggerated. That's *On Davis*. The *Jarvis* case in the Ninth Circuit says that you have to look at what a reasonable business person would pay.

And so when you look at the evidence, what reasonable business person would, just as an example, what reasonable business person would pay $40 million when they can get a comparable license for a million and a half from a different company. I mean, it's just completely out of proportion.

And I think the *Oracle* case is directly on point because the evidence -- there was evidence in that case like a price list. Right? The court didn't say it was inadmissible, considered the evidence. But here's what it

said. "Although a copyright plaintiff need not demonstrate that it would have reached the license agreement with the infringer or present evidence of benchmark agreements in order to recover hypothetical license damages, it may be difficult for a plaintiff to establish the amount of such damages without undue speculation in the absence of such evidence." Benchmark evidence.

Here, because Oracle has no history of granting similar licenses, as in this case, and has not presented evidence of benchmark licenses in the industry approximating the hypothetical license in question here, as in this case -- I'll get to the benchmark evidence -- Oracle faced an uphill battle. Oracle bore the burden of proving the fair market value of the hypothetical license in question. And we agree with the district court that Oracle failed to provide sufficient evidence of the market value of the hypothetical license underpinning the jury's damages award. And there was a grant of a new trial in that case.

It's exactly the same thing here. I mean, if you look at -- remember what you are trying to figure out. This is actual damages, right? What would FICO have gotten if everything worked the way it should have? Well, we know the answer to that. We know the absolute top value that they could have gotten, because the undisputed evidence shows that they would have offered my client a $3 million license

for the combined entity. You usually don't have that kind of evidence, right?

THE COURT: All right. So your motion -- I don't have to get into whether or not the evidence was properly admitted.

MR. METLITSKY: You don't have to. I mean, like we still think it was improperly admitted; but, again, if you want to not get into it, don't get into it. We'll, you know --

THE COURT: No, I, you know, I'm trying to discern, on that topic, I am trying to discern -- you know, we're all big -- we're all adults. Okay? So tell me, Did I misunderstand Judge Wright's summary judgment ruling or did Judge Wright, in your estimation, get it wrong or is it both or either or what?

MR. METLITSKY: Well, I guess it depends on what -- I don't know what was in Judge Wright's head. If what was in Judge Wright's head was that the evidence that actually came in in this trial the way it came in, that Mr. Waid would just testify to something that is not documented -- is not reflective of any real world license and he would just say, Here are all these applications, I would, you know, put this kind of number on it, and that would be my opening position, if that is what Judge Wright was saying, then she was wrong.

I'm not sure that she was saying that, because there's -- you know, I just don't know what she meant. She didn't specify what part of the report that she was excluding, what, you know, the underlying numbers would come in. All I know is what actually came in.

THE COURT: I don't want to get too bogged down in this, having set a time limit on you, but she said some of the facts underlying Zoltowski's opinion may be relevant, and it would seem to me that that has to mean their application-based pricing model. And then, you know, to my mind the harder question is, What I did allow, which is to say, How would that application-based pricing model apply to these applications.

MR. METLITSKY: Right. I mean, as to that, setting aside the admissibility of the charts and all that, which we think those were inadmissible too, but even if the charts were admissible, I don't understand how that could be anything other than a subjective view of what we would like to charge, when there's no real world evidence that has ever happened in a case like this, just as in the *Oracle* case.

If you look at the district court opinion, there was an actual price list in that case, not just testimony. You know, this is, you know, separate from any kind of actual documentary evidence. There was a price list for -- that Oracle, you know, would have charged for licenses like

this. And the court said, No, what you would like to charge doesn't matter if you don't have -- it's your burden of proof to demonstrate what the market value of this license would be; and if you don't have benchmark evidence, it's going to be real hard for you to satisfy your burden.

We have bench -- I mean, we have a ton of benchmark evidence in this case, right, and it's all hundreds of thousands of dollars, several millions of dollars, and I could go through their responses to all of that, but the answer to all of their questions -- or all of their responses is, you know, even if the number can go up by a little bit, it's not going from 3 million to 40 million. You know, we know what the market value of, what the top end -- I said this before, but the top end of the market value of a license for the ACE-combined company was because we know they were going to offer $3 million. If ACE had accepted that, they would have been made whole, and that's the whole question. That's what actual damages is.

So their response is, Well, that was a perpetual license, and so we wouldn't have sold the perpetual license, we would only sell a license for four years, and that would cost ten times as much, you know.

THE COURT: Well, I think their argument was since it's not going to be a perpetual license and we're not going to be able to count on, you know, an income stream over

time, we would have priced the license differently. It wouldn't have been three. I know that leads to begging the question, Well, if it wouldn't have been three, what would it --

MR. METLITSKY: How would it have been 40? And not only that, I mean, *Jarvis* is directly on point here. In that case it was photographs, I think. And the expert in that case was saying, Well, the license for monthly use was X, and that's how I'm going to calculate the value of the hypothetical license. And the court said, Well, you can't rely on the monthly license, because an annual license costs twice as much as a license for one month would cost, and no reasonable business person would purchase licenses every month if they could just purchase an annual license for a fraction of the costs.

It's the same thing here. Why would a rational buyer, a willing buyer -- they could offer whatever they want. They could say, you know, I have this, I predict that you will only use this for four years somehow. I don't know how that would work. But why would a willing buyer say, Well, you are charging me 40 million when I can get a $3 million perpetual license? You know what, I'll buy the $3 million perpetual license, and I'll not just have the right to use it for four years, but for all the other years that will ever exist in the future of the world. Right? I

mean -- and if not, if you still say no to that, you say no, no, it's got to be 40 million, I'm just going to go ahead and buy Drools for a million and a half. And their answer to that is, Well, there's a PowerPoint presentation that says that Blaze is better than Drools. Well, Mr. Ivey testified that they're comparable, but let's say Blaze is better than Drools. Is it 26.67 times better than Drools? Is there any evidence that would suggest that somebody would pay $40 million for Blaze rather than paying a million and a half for Drools? Let's say it's a hundred percent better. What does that get you? It gets you to $3 million, which is what they offered. The actual market value we know, the top end of the market value for a license that would have made them whole.

THE COURT: If the jury wasn't free to decide that this hypothetical negotiation could have resulted in a license fee that was within their application-based pricing model, doesn't that just lead me right back to, So why the heck did you let it into evidence?

MR. METLITSKY: I mean, my first answer is yes, but my second answer is not necessarily, because the evidence can still be relevant, but they would have had to back it up with something else. Right? Just as in *Oracle*. Right? You can't have -- even if evidence is admissible, the result cannot be unconstrained by reality, and

reality --

You know, like just take the simplest example. What is the market value of IBM stock? That's pretty easy to figure out, right? But what if a buyer came in and said, You know what -- or a seller -- I have this stock and it's trading at $20, but, you know, my opening position would be 100. I don't know. Is that admissible? It seems like no. But if you admitted it, does that mean a jury could find that the license -- that the market value of IBM stock was 100 or as in this case 120? Of course not, because the actual objective evidence of what people paid for the license is in the low millions.

THE COURT: Well, but, you know, what about their argument -- all right. I really am going to wrap it up a little bit. But their argument, in part, is the evidence that you're relying on, we all distinguished.

MR. METLITSKY: Right.

THE COURT: The [redacted] license wasn't by any means entity-wide. The [redacted] license was --

MR. METLITSKY: Right.

THE COURT: -- limited use, et cetera.

MR. METLITSKY: Right.

THE COURT: So the fact that you are saying these other licenses are benchmarks, So what.

MR. METLITSKY: Yep.

THE COURT: We showed that they weren't.

MR. METLITSKY: So let me give you three answers. The first answer is they had access to every single FICO license -- Blaze license that has ever been offered to anybody ever, and they introduced none of them or certainly none of them that looked like this.

The second answer is we have the most comparable metric possible. We have the number that they would have offered for the literal license that we're talking about, the market value of a license to use Blaze that would have covered the infringing use, and it was -- I think it said 3-plus million, something like that.

THE COURT: Right.

MR. METLITSKY: You usually don't have that kind of evidence, right? That's amazing evidence, because you have the offer, which is going to be the top line number. Presumably, the buyer would have negotiated and would have come up with a lower number, but at least you know what the top is going to be.

And the third answer is these numbers are always constrained. This is not a monopoly. They're always constrained by the existence of alternatives. No reasonable business person would ever, ever, ever pay $40 million for something that they could get for one and a half million, even if they're right that the one and a half million was,

you know, worse in some sense. Their own witness said they were comparable. So it's not like there is an order of magnitude difference between them. No rational jury could find that.

THE COURT: Two last questions. Given everything you are saying, Why didn't you move for remittitur? Is it because any number, that if this court were inclined to do that, would be speculation, number one? And, number two, the jury kind of in my view clearly found there's two licenses, one, right, and then a second one to ACE?

MR. METLITSKY: Yeah, so on the first one I think it's just within -- it's within the court's discretion to do a remittitur, because then they would have the option of either accepting the remittitur or rejecting it, in which case there would be a new trial.

I mean, I think a remittitur would have to be somewhere in -- you know, we said in the low millions of dollars, and it's up to the court what the exact number is, but I would find it surprising that it could be more than they would have offered for the license at issue.

As to the two licenses, well, if that's -- that itself made no sense, right, because they found -- I think it was something like four and a half million for a nine-month license and then many, many, multiples of that for a license that went three or four times as long. To the

extent the jury thought that there was somehow some difference between the Federal and the ACE uses, that just would have been -- that's just a legal error.

THE COURT: Well, that comment all seems to me to -- assume that your argument that as long as it's not expanded use, it's one license; whereas, what they're saying is, Federal, beyond the termination of the contract, and then ACE, who is not a party to this, you have an argument that licensing Federal license as ACE, but the jury seems to have said otherwise.

MR. METLITSKY: But all the -- no, no, no. So we accept the jury's verdict for purposes of this motion that there was copyright infringement as to Federal and as to ACE, but all of the benchmarks are for the combined company. So the 3-plus million that they were going to offer was for the combined company, for every entity within the Chubb/ACE merged company to use. The one and a half million dollars that they actually paid was for the combined company. So you have to look at the -- you know, the jury said 40 million for the combined company, however you slice it. The slicing itself made no sense. But, you know, when you add them up, it's 40 million. Is that rational? No way, not even close.

THE COURT: Okay. Thank you.

So 15 becomes 23. I'll give you 23 minutes.

Don't feel like you need to take it all.

MR. HINDERAKER: Your Honor, I feel like I don't need to take it all.

THE COURT: All right.

MR. HINDERAKER: I got to find a place to start, though.

How many times did we just hear the proposition that there was no benchmark agreements? The court's question hit that nail on the head in that it was the defendants' burden, not plaintiff's, the defendants' burden to demonstrate that any of these other license agreements that the defendants now -- that relied upon then and argued from then and rely upon now and argue from now are comparable. Absence a comparability of those agreements to the hypothetical negotiations of 2016, following termination of the license agreement, under the construct that you have guided -- you gave multiple occasions of guidance to the parties -- under the hypothetical and under the circumstances of that hypothetical negotiation, a license agreement has come to an end in 2016, we're going to negotiate a term license following that ending in 2016. The jury was permitted to give those agreements whatever evidence or weight that they deemed that they had.

So the testimony at trial was to the effect that in 2006 FICO had just been -- Blaze Advisor had just been in

the marketplace for a few years, hadn't made a profit yet, highly discounted, heavily aggressively discounted its pricing. And Mr. Folz testified that he got a really great deal for being the first in, and he got a license agreement that was almost half of what his budget was.

Then we go to 2016, before the lawsuit. Schreiber testifies, This is a great client, We want to keep it, We want a long-term relationship. And there was internal conversation about a 3-plus million dollar for a long-term continuing relationship with -- oh, and the argument was just made, combined company, nonsense -- a continuing relationship with the client. We always think it was Chubb & Son, a division. The court ruled that it's Federal. It doesn't matter. The continuing relationship was with Federal. ACE American is not even known to exist in FICO's mind at that point in time.

And in those, in that offering -- or not offering, but in that conversation internal of 3-plus million dollars, as Mr. Baseman testified, Chubb was interested in Model Translator. Chubb was -- a new product. Chubb was interested in a new product called Model Governance. Chubb was interested in exploring a cloud-based platform for using Blaze Advisor. The evidence before the jury is that there were long-term opportunities for FICO.

Now, counsel and the court just speculated, Well,

how do you get from 3-plus to 40? We didn't have to put on that testimony because it's not our burden to make comparables. It wasn't comparable when in -- to the hypothetical negotiation where there is no existing relationship at all after the term of four or five years.

To advise the court, the pricing of the cloud offering is completely different pricing than on-premises pricing. It's a transaction service-based pricing. Clients -- we heard the testimony of Baseman that clients are moving to it, clients are accepting it. Why do clients accept it? Because FICO takes on more and more of the IT burden -- FICO prices it higher, gets more fees -- and the client has less and less IT burden.

Now, there is evidence of Exhibit 527 where Chubb itself is looking at, Do we want open source or do we want a vendor-based. And a number of those entries are talking about the fact that with a vendor-based we don't have to use our IT resources to support the vendor-provided product. We do with the open source, Drools.

But, nevertheless, it's not FICO's argument to say, to make, because it wasn't FICO's burden to make the comparable. It's not FICO's argument to make that the license -- the negotiation should look at what Drools was, because they're not comparable. We had the cross-examination on that, and the jury could decide that it

was credible or not credible. I think they decided that it was not credible, and that's their decision to make.

And I guess I'd say in many ways the defendants' argument for a new trial is an argument saying, We wish the jury had saw the evidence the way we see it; We wish the jury had weighed it differently; We wish the jury had found these old 2006, 2005, 2008 agreements comparable; We wish the jury would have believed the nonsense that when the issue is damages, for the period of the improper use, that you would negotiate a perpetual agreement forever. So that's not even -- that's just simply counter-factual.

And the jury was able to credit Mr. Waid's testimony that beginning in 2011, moving into 2015, as the marketplace was more and more acceptance of Blaze Advisor, as they were discounting less and less, as they were looking -- as FICO was looking for recurring revenue, more and more they were able to negotiate with the licensee a fixed-term license, more and more they were not relying upon a perpetual. Yes, did Mr. Waid also truthfully testify that if in a unique circumstance what we could get was a perpetual, we wouldn't walk away from the deal, there was some licensing on that, but the marketplace was moving toward application-based pricing.

THE COURT: But even with that, I mean, the heart, setting aside the evidentiary issue, the heart of what

defendants are saying is that there is -- what is it that a jury would have used in the evidence that was admitted to say that both parties would have agreed to a license at $40 million?

MR. HINDERAKER: What the jury had was Mr. Waid's testimony that -- and I'll answer your question by also responding to the notion that all of this is subjective. The jury had Mr. Waid's testimony that FICO entered into license agreements based upon that 2003 pricing guidelines and they have done it for more than a decade, because the marketplace accepts that approach to pricing.

He testified that the discounting practices changed, as referred the product getting more and more accepted in the marketplace, but not the pricing. That's objective.

The size of the defendants' applications, that's objective. Small, smaller fee; very large, larger fee. Using the FICO matrix for sizing, that's objective.

The number of applications that the defendants used, that's objective. As this court guided the parties, the extent to the defendants' use is, of course, relevant in hypothetical negotiation. As judge -- the words that Judge Wright used, "intrinsic value," the heavy intrinsic value that these applications were giving. Mr. McCarter said the applications using Blaze Advisor are core functions

of an insurance company. You can't sell insurance without a policy administration system. Many of the applications using Blaze Advisor were policy administration systems. The jury could credit that the defendants were getting, extracting substantial value.

The fact that Blaze Advisor is priced based upon the unique value to each customer, the jury could credit Mr. Waid with that, and it's true, which makes the IBM stock analogy just simply unreal.

THE COURT: But it's still --

MR. HINDERAKER: And then to further answer your question. So all of these objective factors of what the marketplace was doing. And then Mr. Waid said many times this is only a starting point for FICO.

Now, I can only testify to what my experience is, and he did, and in my experience and in the negotiations the licensee comes up with these other arguments, additional products, more applications. They were all listed out. They were all listed out in his -- and it's on page something or other in our brief. They are all listed out on the demonstratives that the jury had, and the jury was able to give those considerations in light of the evidence. And they were other, other existing streams of revenue, opportunity to sell more product. What's the business impact of Blaze Advisor on the licensee? The level of

effort, was there any impact in terms of helping them migrate away? Up-front commitment fees, was there any of that? What was the size of the transaction? Perhaps a bigger size, may be more revenue, more discounting. Will they give us references for case -- references for new clients? Can we use them as a case study for marketing? What's the duration of the contract? Are there other professional services fees?

Each of those are factors that the jury could look to in saying, Okay, that's the start of the negotiations; Now, it's my job as jury to put together the hypothetical. And they decided that, Well, on balance, when they looked at the graphs that Waid had, there was more upward pressure than downward pressure. And so they went from 60 -- and Waid was saying, I'm not telling you what the damages are; These are not our actual damages; This is our starting place. And so the jury saw 36.5. They applied more upward pressure than downward pressure, and they got to 40.

Now, the jury also had the [redacted] license. It was 2019, closer in time to the 2016 marketing practices of FICO and negotiating practices of FICO than the 2006 examples.

There was one application for five years, and the all in fee, license and maintenance for that one application for those five years was $[redacted] million. You extend that out by 16 applications, and it's $[redacted] million.

And let me back up for a moment, in terms of these notions of benchmarks. Mr. Waid testified credibly, cross-examination was not there on this point or any other, really, but the jury could well believe Mr. Waid that after his decades' long experience, after his more than hundreds and hundreds of negotiations, when I asked him -- I think it was in the context of the [redacted] license -- the pricing of this license, is it consistent, was it consistent with the pricing guidelines that you're applying now here in this case? And he said yes.

Mr. Waid was testifying honestly about how FICO would go into the negotiations on a named-application basis, and he testified to the progression that FICO went through to more and more license on a named-application basis. The jury had the consideration from the defendants' argument, Well, what would it have been on a perpetual basis? Well, does that make any sense in light of the jury instructions that I'm trying to find damages for a term? The defendants argued, Well, let's price based upon an enterprise-wide pricing. Mr. Waid gave the jury those numbers and the approach that FICO -- and the result. He said, We don't do that; We're going away from that; but if you take an enterprise start and then apply that to a term, and he gave the jury $29 million number, about 29.5.

So the jury had the information. It was for the

jury to assess credibility. A person testifying on the stand that this is how we would price it on a standard basis is credible. The defendants had discovery from us of all of the license agreements. The court ordered us to give it to them. And what we got is what we got. None of them were comparable. None of them impugned the credibility of Mr. Waid with respect to standard pricing.

THE COURT: But let me interrupt for a second.

MR. HINDERAKER: Mm-hmm.

THE COURT: What Mr. Metlitsky is jumping up and down to say in response to all this is, That's all well and good, but that's all what FICO wants; and what evidence is there in the record that would say that Federal or ACE would ever willingly agree to pay that amount for the use that was made.

MR. HINDERAKER: If you're asking for evidence of whether the defendants would willingly pay anything, the answer is I don't think the defendants would willingly pay anything.

THE COURT: Right. No. What's reasonable.

MR. HINDERAKER: We're talking about the hypothetical negotiation of a reasonable licensee. And the jury heard the evidence of what goes into the negotiations of a reasonable licensee. FICO offered its testimony. It's notable that the defendants have no testimony in terms of

factors going into a hypothetical negotiation, but the hypothetical negotiation is looking to an objective assessment. That's why I went into all of the factors of what Waid is doing. It's not what he wants, not what FICO wants. That's the objective process that they go through to get to a number.

Now, the jury could consider -- perhaps the jury considered [redacted] perhaps the jury extended that and said, Well, that's [redacted] we think -- you know, Waid came in at 36.5; We think there's upward pressure, 40 million. That's not for our -- not for us to try to define what happened in that jury room.

The question is, Did they have the evidence? Did they have evidence that supports the result that they got? Yes, they did. And they believe Mr. Waid. And what he said would be true objectively in these negotiations was true objectively in these negotiations.

What factors did the defendants offer to put downward pressure on that price? Were they offering more revenue streams? Were they offering to buy more product? Were they going to give us references? Was there any value that they were going to give FICO that would put downward pressure on that? The jury could conclude that there was none.

So I probably lost my notes in all of this, but in

summary, Your Honor -- I don't know how much I happen to have left here, but, obviously, we have to and this court has to look at the evidence as a whole. Based upon the evidence as a whole, not what's cherry-picked by the defendants, the question is, Is the jury's conclusion a miscarriage, a manifest injustice? That's the standard that we're applying, and I offer to say that it is not.

There was one place in the jury's -- in the plaintiff's brief that I think is worth emphasizing, as I close up.

They say at page 26 of their brief the same -- they say the hypothetical negotiation must create generalized market conditions, generalized market conditions, ignoring the court's guidance and ignoring Judge Wright and ignoring the fact that we're trying to assess damages based upon fair market value from the circumstances, the negotiating circumstances, the economic circumstances of this case between these parties.

They want to -- they want an argument that is divorced from the facts of the case, untethered completely. Let's go to a stock market. Let's consider Blaze Advisor a commodity. Now, the fact that Blaze Advisor is priced at one thing for a small company and the very same software is priced at more for a bigger company, let's ignore the fact that each negotiation is unique. And whatever "generalized

market conditions" mean is beyond me as well.

They cite the *Gaylord* case, and this is what the *Gaylord* case says. "The use of past licenses as evidence must also take account of economically relevant differences between the circumstances of those licenses and the circumstances of the matter in litigation."

And that's what I'm suggesting in terms of the absence of any comparability. The different economic circumstances must be taken into account, and the negotiations are about the particular economic circumstances of the two parties in the negotiations at the time of the negotiations.

Our brief addresses the fact that FICO never suggested in the context of these negotiations any notion of punishment. They simply followed the court's statement to the jury that we're assessing the damages for the period of the improper use.

I'll leave to the brief the fact that those two charts are business records, came from the business -- normally kept records of the defendants. Clearly admissible as business records.

It's also worth noting that those two charts -- one of them was prepared, well, produced to us a year or more after the mediation. Both of the charts do not make a statement of compromise, both of the charts are not

statements that were made during compromised negotiations, and neither of the charts is about the claim of actual damages. It is business information that FICO must use to size an application for its standard pricing.

Thank you.

THE COURT: Thank you, Mr. Hinderaker.

MR. HINDERAKER: I hope I didn't go over much.

MR. METLITSKY: Two minutes. I have two points to make, Your Honor.

THE COURT: He went over by two minutes.

MR. METLITSKY: Okay. Perfect.

The first point is, the overarching argument there is that it was the defendants' burden to show benchmarks? It's their burden to demonstrate actual damages. That's exactly what I just read you from the *Oracle* case. They didn't put in any benchmarks. We put in benchmarks. They think those are incomparable, fine. But what is the evidence that demonstrates actual market value? We think they are comparable, especially the 3 million that they were going to offer to ACE and the one and a half million that ACE actually, you know, purchased through Drools, but --

THE COURT: I think I heard Mr. Hinderaker say that the [redacted] license was --

MR. METLITSKY: Oh, yes. So I was going to go there next.

So, first of all, the legal -- it's just wrong as a matter of law. The plaintiff has the burden, obviously, of demonstrating market, market value, which is actual damages. And as the *Oracle* case says, if you don't have your own benchmarks, you're going to have a problem.

Now, [redacted] is their benchmark. Right? The problem with the [redacted] benchmark is that it was one application, as Mr. Hinderaker just said.

Mr. Hinderaker said the cross-examination was no good of Mr. Waid. Well, one thing that was pretty good I thought was at 1825-26 where he admitted that there was never at FICO, certainly at the time, an enterprise-wide license for 15 -- excuse me -- an application-based license for 15 applications. It did not exist. So of all the things that are not comparable, the one thing you know for sure is the [redacted] one isn't comparable because no license ever existed ever in the history of FICO, at least in 2016, that would have done this application-based pricing for 15 applications.

Again, that's 1825-26. Mr. Waid also testified at 1737-38 that enterprise-wide licenses were generally perpetual.

Okay. So that's the problem with [redacted] And it's also, it's also the problem with Mr. Waid's testimony. Even if you think it's, you know, not subjective, but objective

somehow, it's not actually grounded in the real world. There is no example of a 15-application license that's based -- that's priced by application, which means there is no benchmark that demonstrates the actual market value of that, rather than what Mr. Waid would have started with in a negotiation.

And, finally, their argument about downward pressure. We didn't offer evidence of downward pressure? How about the fact that there are market alternatives? That is the way that a market economy puts downward pressure on how much a willing buyer would pay, regardless of what a willing seller would ask. And we offered undisputed testimony that ACE/Chubb entity, the whole entity, bought a license for this use for one and a half million. They say that there is a PowerPoint presentation that says that Blaze is better. Even accepting that, there is no evidence that it's 26 or 27 times better.

That's it. Thank you, Your Honor.

MR. HINDERAKER: I want to make just --

THE COURT: Go ahead.

MR. HINDERAKER: I just want to emphasize something, if I might.

THE COURT: Go ahead.

MR. HINDERAKER: I encourage the court to look at the transcript at 1825, 6 through 25, that Mr. Metlitsky

just mentioned.

The question to Mr. Waid was, on cross, You're not aware of any application-based license for 15 applications, are you?

His answer was, "That's not true."

He is. If we had another trial, we'd bring it up, but anyway I just -- the court will look at the transcript.

THE COURT: I will look at the transcript.

MR. HINDERAKER: That's what he said.

MR. METLITSKY: Your Honor, could I just point you to the part of the transcript that you should look at? It's like the next several lines where Ms. Godesky impeaches him with his own deposition. And then he says, Well, at the time, that is, at 2016, it was true. Isn't that the time we're looking at for purposes of the hypothetical negotiation?

THE COURT: Okay. Thank you.

So, Mr. Hinderaker, why don't you take up the issue of entitlement to attorneys fees. And I really got to hold you to five minutes.

MR. HINDERAKER: And, Your Honor, I'm going to defer to Ms. Stradley.

THE COURT: All right. Ms. Stradley, come on up.

MS. STRADLEY: Thank you, Your Honor. And I will try to be very quick.

I wanted to start with discussion of the objective reasonableness of the defendants' positions. And I want to look at the factual and legal components of Federal's positions and then separately the factual and legal components of ACE American's position. So I want to try to keep them separate while we talk.

With respect to Federal, as we stated in our brief, at summary judgment Judge Wright did state and accepted Federal's legal position that Section 10.8 could reasonably be read as Federal had described, but then at trial they didn't offer anything to back up or support their legal interpretation. They cited to -- there was no evidence presented at trial to support that interpretation. And I want to look at the brief at what they tried to do to rebut our position that they didn't offer any evidence.

First, they try to argue that we shouldn't even look at the factual component. Well, that's wrong. If you look at the *Pinkham* and *Fogerty* case, it expressly says that objective reasonableness does consider the factual and legal components.

And then they also cite to and rely on two cases, the law of *Devonshire* and *Greenfield*, for the idea that, well, you're looking at a written contract, you should just look at the text of the contract. Well, those cases are inapplicable or maybe inapposite is a better word, because

the discussion that they pulled those statements from are discussing unambiguous contracts. So, of course, when you're looking at an unambiguous contract, you do just look at the language that's written in the contract. But here we know that the contract is ambiguous from what Judge Wright found, so we do need to look at the intent of the parties and the extrinsic evidence. And they didn't cite or provide any evidence to the jury to support their interpretation other than just their own attorney argument.

The two pieces of evidence that they identified in their brief as supporting their interpretation actually don't. The first was that they looked to other Blaze Advisor license agreements. We had this fight before in front of the court. Those other license agreements that aren't relevant to the intent of the parties, you held that at 825, lines 10 through 17. You instructed the jury to the same effect at 2608, lines 8 through 10. So those are not evidence of the parties' intent or their interpretation, defendants' interpretation.

The other evidence they point to was that there was evidence of no expanded use. Well, that doesn't actually speak to supporting their interpretation. You don't get to whether there is or isn't expanded use until you first prove the interpretation as correct in the first place. So no evidence to support their actual

interpretation, no facts to support that.

You go to ACE American. Also no facts to support their attorney argument. If you think back to the trial, the only thing that was offered was slide presentations during the opening and closing, where they swapped names and changed who the client was, but there was no support that that was the intent of the parties, the understanding of the parties. It was a conjured-up litigation argument.

And we know that because when you actually look at the evidence that was before the jury, before litigation began, their own general counsel stated that the client remained Chubb & Son, but no assignment had occurred. And if you look at -- and that was Exhibit P91, also Exhibit 6 to FICO's memo. He stated, notwithstanding the acquisition, Chubb & Son, the contracting party, remains a viable legal entity and the contracting -- remains the contracting party to the agreement. So that's their own general counsel saying that before the litigation began.

Also before the litigation began, what did their business people say? Well, the commercial proposal from Tamra Pawloski, P94, it said, quote, "The contracting party to the license agreement is and remains Chubb & Son, a division of Federal Insurance Company," end quote.

So these are the objective facts before the litigation began. And only after the litigation started did

they come up with this sudden change of names and saying that ACE Limited and Chubb Limited somehow got rights under the license agreement. ACE Limited was never -- ACE Limited and ACE American were never the clients under the license agreement. They weren't a party to it. And they never provided any facts to support their contention that somehow some transfer, some deed assignment occurred.

The only thing that the defendants point to to support their objective reasonableness with respect to ACE American is your denial of FICO's JMOL. And with respect to that, the fact that there's a denial of a JMOL does not mean that there was necessarily an objectively reasonable position. Now we've had the benefit of time and availability to review the record and see what exactly did they present to support their position; and when you look, they didn't support their position. They cited to nothing in their brief. And if you check the record, there is nothing. The only evidence, again, actually contradicts their current position.

And so given the importance of the objective reasonability of a party, that alone should weigh in favor of attorneys fees.

I'm happy to touch on additional things, but I know we're tight on time. So any specific questions?

THE COURT: I don't have any. Thank you.

MS. STRADLEY: Okay.

THE COURT: Thanks, Ms. Stradley.

MS. STRADLEY: Thank you.

THE COURT: Ms. Godesky.

MS. GODESKY: Thank you, Your Honor. I'll just make a few points.

FICO is seeking $8 million plus in legal fees for litigating the entirety of this litigation, so I'd urge the court to keep in mind what that means. This was a case that litigated four different breach theories. First, FICO said -- and those breach theories, of course, are what underlie the copyright claim for which they're seeking fees. Right?

And we have first the breach theory that global use of Blaze wasn't allowed, so there was copyright infringement. We won summary judgment on that.

Then they had the theory that Chubb & Sons global affiliates couldn't use Blaze. We won judgment as a matter of law.

Then they had a theory that we committed copyright infringement by letting third-party consultants use Blaze. The jury found for us on that.

And then, finally, there's this question of 10.8 and whether there was a breach of the no-assignment clause and whether that constituted copyright infringement. And so

that's the only piece of this copyright infringement claim where there actually is some reasonable dispute as to the parties' positions. We were objectively correct as to the other parts of the claim, and we even had statements from Judge Wright at the summary judgment stage that their position on some of those breach claims was absurd.

So as far as the Section 10.8 claim goes, our litigation position was absolutely objectively reasonable. We have Judge Wright's finding at the summary judgment stage that our interpretation is reasonable and it should go to the jury to resolve the factual issues.

And then in the post-trial stage, Your Honor found specifically with regard to the ACE claim that, quote, "The testimony at trial would permit a reasonable jury to find either way."

And so this is not the type of circumstance where there should be an award of attorneys fees. This is always within the court's discretion. They're never awarded as a right.

And the types of case that FICO cited in their papers, like the MPAY case, are in a different universe. Those are cases where the parties' position was, quote, "so clearly untenable as to be utterly without merit. Situations where the party insisted on maintaining its claims despite clear guidance from the court." That is not

Chubb's litigating position vis-a-vis 10.8.

And so like Ms. Stradley, I'm happy to tick through the other factors, but we don't think the fees are warranted here.

THE COURT: Okay.

MS. GODESKY: Thank you.

THE COURT: Thank you.

All right. Pre- and post-judgment interest. Who among you is going to be discussing that? All right.

So, Ms. Kliebenstein, as you come up there, I guess I agree with defendants that calculation is really premature for today. The questions in my mind are, Other than the contract claim, the entitlement to it or the reason to grant it pre-judgment-wise and your thoughts on appropriate interest rate. So with that, hopefully that helps you. Maybe not.

MS. KLIEBENSTEIN: Yes.

THE COURT: Okay.

MS. KLIEBENSTEIN: Yes. How long would you like to hear from me, Your Honor?

THE COURT: Five minutes, if we could.

MS. KLIEBENSTEIN: Sure.

So I boil it down to three questions really. Can we receive pre-judgment interest? Should we? And what should the rate be?

THE COURT: Right. The "can" is clearly yes, right?

MS. KLIEBENSTEIN: I believe so.

Defendants have cited the *Eclipse* case for the suggestion that it's not an available remedy in this court; but if you look at that case, something different was going on. Statutory damages were awarded, and I believe Judge Wright had set them at five times the fair market value. Statutory damages and disgorgement are different beasts than actual damages. Pre-judgment interest is intended to allow a plaintiff to recoup its lost investing opportunity, if you will, on money that was owed. So actual damages is what to pay attention to. So I agree with Your Honor. Can we? Yes.

Second question, Should we? My answer again is, is yes. The test for pre-judgment interest, it's to be awarded. The default is that it's to be awarded when damages are due, unless there are exceptional circumstances to justify withholding it. The baseline is not like attorneys fees where it's a different test.

The defendants suggest that the bar to receive pre-judgment interest in this case is higher or it's similar to willful infringement, but that's not what's borne out in the case law.

Courts throughout the Eighth Circuit and

throughout the country really look at two factors when they're deciding should a party receive pre-judgment interest. Will an award serve to compensate the injured party for the lost use of the actual damages? And then the second part is, Even when it would serve a compensatory function, do equitable considerations preclude the award?

I think in this case the very first part of that test, will it compensate FICO, that analysis is easy to meet. $40 million represents the fair market value of the license fee to FICO that was awarded today, but it should have been paid in 2016. There were lost business opportunities, lost interest-earning opportunities, et cetera, from that amount from 2016, '17 through today.

I think it's also important to note, under the facts of this case, FICO's in the business of licensing software. This amount, this 40 million, is the license fee, which is the bread and butter for FICO. It's not a tangential amount to the business. So it's important to keep that in mind as we're looking at the equities.

Moving to the second factor, Are there any equitable considerations that preclude the award? When you're looking at equitable considerations, it has to be behavior, facts, circumstances that are outside of the ordinary. One aspect that defendants highlight in their brief is it would be inequitable, against the equities, to

award pre-judgment interest to FICO because we've already been adequately compensated. 40 million is already far too high, in their mind, and that's enough.

That's not the right way to look at it. The $40 million the jury decided was the fair market value. The question to answer with pre-judgment interest is, What is the lost value to FICO of not having had that 40 million in 2016 and 2017?

The cases that defendants cite for that proposition, that large amounts are adequate compensation in and of themselves, are inopposite. And it takes a little bit of time to dig into them, and I will give you one example.

The *Masters* case. It was an Eighth Circuit 2010 decision. And defendants cite it as support for the proposition that a $2.4 million award was enough compensation. Now, if you dig down into -- you have to go one step further and look at the district court's decision to figure out exactly what happened. That 2.4 million was for disgorgement. No actual damages were awarded in that case. The district court found it would be inequitable to award interest, noting that disgorgement and actual damages are different. Actual damages are meant to compensate a plaintiff; disgorgement is something different.

Each of the cases cited under that part of the

defendants' brief are the same. You've got either a disgorgement award at issue or you've got -- I believe it was the *EFCO* case -- a future damages award. So that makes it fundamentally different.

Defendants also argue pre-judgment interest shouldn't be awarded because defendants had defenses that were not baseless. Again, equitable considerations have to be something above and beyond the ordinary. We would expect parties to have reasonable non-baseless positions for their claims and their defenses.

Next, the defendants cite the amount of time lapse between when the infringement began and judgment. It's approximately seven years. That's a long time, and it results in a larger number. However, there's nothing out of the ordinary within the course of the seven years of this litigation that make it inequitable to award pre-judgment interest.

I think this argument actually cuts against the defendants. FICO's the one who has been without the $40 million in license fees since 2016 and 2017. Defendants have had the benefit of having that money to invest in their company and earn interest on it.

Moving on to the rate. So I've answered the "should we" question. Yes, there are no factors in this case that make it inequitable, out of the ordinary, such

that pre-judgment interest shouldn't be awarded.

The rate. We say in our brief the statutory rate. They say the treasury yield rate. I don't think that's probably surprising for Your Honor; but, again, if we dig down into the cases, I think we can find the right result pretty quickly.

What is the treasury rate? It's the rate that's in 28 U.S.C. 1961 for post-judgment interest, but at its core it's a risk-free interest rate that is backed by the U.S. Government and only the U.S. Government can use that to access capital. This is key. Nobody else gets to borrow at that rate. FICO doesn't get to borrow at that rate; Chubb doesn't get to borrow at that rate.

Another fact the court should keep in mind is that the treasury bill rate has fluctuated over the years. Recently, particularly during the pendency of this lawsuit, it's been very low, .07 in fact for one of the years at issue. In other years it's been very high, such as during the savings and loan crisis in the 1980s.

When you're reading decisions that adopt the T bill rate, pay attention to the year and pay attention to what's going on with the greater economy, because oftentimes you can figure out why that rate was selected over another. It has been very rare that a T bill rate similar to .07 has been adopted by a court as the number of the lost value of a

judgment.

One helpful case that I read that was cited in the defendants' brief was the 2013 Sixth Circuit *Schumacher* case. And that court did a really good job of articulating how to look at the competing interest with an interest rate and come out at the right answer. The Sixth Circuit directed its district courts to look at what rate best reflects the remedial goal to place the plaintiff in the position it would have been, what rate prevents unjust enrichment to defendants from keeping large sums of money, and finally what rate combats inflation.

In that Sixth Circuit *Schumacher* case, the district court was reversed for, quote, "mechanically applying" the treasury bill rate and citing 28 U.S.C. 1961 as its support for doing it. And at the time the district court made that decision that led to the appeal in *Schumacher* in 2012, the treasury bill rate was .12. And the Sixth Circuit said that's a really low rate. What else is going on in the economy? And the court noted that defendant's rate on return, their profit margin, was 6.55 percent and borrowing costs at the time were 7.75 percent.

Here, we have the same thing going on. We have extremely low treasury bill rates from 2016 to 2023. And we also know that from all of the financial documents and the

10-Ks that we had to sit through during trial, FICO's net profit margin varied from 12 to 29 percent. Chubb's profit margin varied from 4 to 16 percent. This is a much higher amount, and it reflects of the money that these parties are investing in their business how much money -- what are they making as a return, which I think is a much better analysis as opposed to the post-judgment interest rate.

I think another place that the court could look is the prime lending rate from 2016 and 2017 to 2023. I have a declaration that has the prime lending rate and how that affects the pre-judgment interest award, but it varies essentially from 3.75 to 8.25.

And what is the prime lending rate? Well, that's the rate that major commercial banks charge their most creditworthy clients. That's the rate at which both parties can access capital, which I believe is a better indicator of the proper interest rate other than the treasury rate.

Now, the third question the *Schumacher* court posed is, Well, how much money did the defendants make off of that 40 million? Well, again, we look at the profit margins and we look at the prime rate for support on that.

And, finally, I don't think we can lose track of inflation, particularly during this window in time. I did some research; and, again, it's in my declaration, if the court wants it today or we can file it. The cumulative rate

of inflation since 2017 has been over 26 percent. If you do the math, 40 million in 2016 is 51 million today. If you do the reverse math, 40 million today is 31 million back in 2016.

These are the reasons why the mechanical application of the treasury bill rate is improper. It makes sense in the post-judgment context when the considerations are different.

And the *TMTV* case out of the First Circuit in 2011 really went into why the post-judgment rate and the pre-judgment rates just aren't the same beasts. A successful plaintiff can require a prompt payment. The federal rate is -- the T bill rate is often depressed by monetary policy and not really reflective of how much a party can make in the general market.

Further, when you're in post-judgment, a bond is posted. There's a security interest. Federal marshals are going to go get that judgment. So it's a more secure asset that's being invested in.

For these reasons, I think the court should not look at the treasury bill rate, but look at the Minnesota state statutory rate, which is actually less than the profit margin of these companies during the period of time.

THE COURT: Thank you.

Ms. Godesky. So I'll ask you the question that

they're going to hate and you're going to want. If I am persuaded -- I'm not saying I am, but let's just assume I'm persuaded that the actual damage award in this case is such that it's affirmed, but really high. Is that a factor I can consider in determining whether and how much pre-judgment interest can be awarded?

MS. GODESKY: I also don't like that question, Your Honor.

THE COURT: Okay. Well, I figured you might not like part of it.

MS. GODESKY: I don't like part of it, just for the record.

But absolutely. I mean, what they're asking for here -- Ms. Kliebenstein didn't say the number, but on top of this completely irrational $40 million/4-year license fee, they want the court to award them an additional $25 million in pre-judgment interest on top of the 2.6 million everyone agrees they're entitled to, approximately, for the breach of contract claim.

So if the question that's posed to the court is whether they're being compensated for any lost time value of money, the court can look to the fact that they're already receiving $2.6 million in pre-judgment interest under New York's mandatory statutory rate to rest assured that that time value of money is being recouped.

But what I would say is I do think Judge Wright is correct when she did a survey of the law in the Eighth Circuit in the *Eclipse Sportswire* case that there is no binding decree from the Eighth Circuit that PJI is recoverable in copyright cases, number one.

What we do know from the Eighth Circuit and is recited in the *Stroh* case, S-T-R-O-H, is that the court is supposed to look to whether there are exceptional or unusual circumstances that would render PJI inequitable. And to the extent we're in a world where a $40 million/4-year software license actual damages award is affirmed, then awarding $25 million plus of PJI on top of that would absolutely be inequitable.

I do think the *Masters* case and the *EFCO* case from the Eighth Circuit are instructive on that point. The type of parsing that Ms. Kliebenstein has read into the opinions does not appear in the language from the Eighth Circuit. What the Eighth Circuit says is you look at whether the party has been adequately compensated. And in those cases they looked wholistically at the award and felt like the party was adequately compensated and so did not award pre-judgment interest.

FICO's only authority for this idea that you don't consider the size of the damages award in deciding whether to award PJI is this *Stemtech* case from the Third Circuit,

which is obviously not binding on this court.

The Eighth Circuit has also instructed in the *EFCO* case that you do take into consideration the amount of time that has lapsed in a litigation; and in that case they said this has been going on for three years, it would be inequitable to award PJI in those circumstances. Well, we've been litigating for seven years; and contrary to what Ms. Kliebenstein suggested that there were no unusual circumstances, there was a worldwide pandemic that put litigation on hold, right, so everything was delayed and protracted for that reason.

And so I think under the Eighth Circuit's mandate in *EFCO* and *Masters* awarding any pre-judgment interest on top of the $40 million actual damages amount would be highly inequitable.

I will also just say that I think FICO has come to court today with a declaration supporting all sorts of new calculations, because they realized based on our opposition brief that the *Dependahl* case from the Eighth Circuit that they cited in their papers as relevant for determining the pre-judgment interest rate, you know, that that reasoning has changed, because the *Dependahl* case said -- and they cited it for the fact that you should apply the state statutory rate, but that's because at the time of the Eighth Circuit's decision in *Dependahl* the federal statute that

says how you calculate post-judgment interest cited to state statutes. Well, that statute has changed, and it now says, you know what, apply the one-year treasury bill. So under the reasoning of *Dependahl*, it's the one-year treasury rate that should apply, not the state statutory rate and not any new creative LIBOR-based or lender rates that FICO is suggesting now.

THE COURT: All right. Thank you.

MS. GODESKY: Thank you.

THE COURT: All right. So let me give you a couple of comments on a couple of the other motions and then some direction. Hang on.

So I don't need argument on FICO's motion, renewed motion for judgment as a matter of law. And I don't really need argument -- well, I don't need argument on the question of findings of fact and conclusions of law with respect to the disgorgement verdict. I think I naively hoped that just maybe everybody would just accept the verdict.

But having looked at the issue and tried to figure out what's the most efficient and fair way of doing this, I've concluded that I'm going to solicit proposed findings of fact and conclusions of law from the defendants 30 days from today.

You can do that, I'm assuming?

MS. GODESKY: We can do that.

THE COURT: All right. And then FICO may have 30 days to file objections to or alternatives.

But recognize that I haven't changed my view on where this ends up. So the function of any proposed findings of fact that you submit that are, you know, trying to establish that disgorgement is necessary and appropriate aren't going to win the day here. Okay? But they will preserve your rights on appeal.

To the extent that you have objections to certain of the proposed findings that they file that are in a different category, certainly those are welcome and will certainly be -- well, they will all be considered, but those will be considered in a different way, so to speak.

What we'll do then is get the order out on all of this, including the findings of fact and conclusions of law with respect to disgorgement.

I guess the question back to the parties, Under the rule, you have the right to object to those then that the court adopts. So the question to you, I guess, Mr. Hinderaker, is, In this procedure I'm proposing, assuming there's no waiver of anything, would you want then to object after I've adopted proposed findings and conclusions or would you want to take that as it is, preserving objections, straight to the Eighth Circuit? Am I being clear?

MR. HINDERAKER: Yes.

THE COURT: Okay. And can I do that, I guess is the other question.

MR. HINDERAKER: I'm not, I'm not familiar enough with 52(b) to technically answer your question. And I guess I'm going to give you my response; and if in consultation with the client and the team I'm told I made the wrong response, if I can have the privilege of letting you know by letter.

THE COURT: Sure.

MR. HINDERAKER: But my view is that your findings of fact and conclusions of law serve the purpose of outlining your analysis both factually and legally and, thereby, provide the foundation, if you will, or the basis upon which, should FICO appeal any of those, that analysis or that decision, it would have the basis to do so.

I also think that it would be an extraordinary circumstance where I felt like something you wrote in the findings of fact and conclusions of law and 52(b) was so out of the universe that it would be something that we would even want to come back to you on. You know what I mean.

THE COURT: Understood.

MR. HINDERAKER: That's the extraordinary. Otherwise, we're just, you know, going around the mulberry bush for no reason.

THE COURT: Right.

MR. HINDERAKER: So that's my view, Your Honor; and if I'm told I was off base, we will let you know as soon as we can.

THE COURT: All right. And I just want to be clear. I haven't done the research under 52(b) to see, you know, am I doing something that's inappropriate. I don't have the sense that it would be somehow improper if the parties -- if we go this way. Certainly, the point being your objections, your concerns with whatever is done are preserved for appeal. That's kind of baseline. That's true of everything that's gone on here, even though I've withheld entering judgment. Obviously, all the issues you've raised and issues you've raised during trial that were preserved are preserved for appeal.

So, Ms. Godesky or Mr. Metlitsky, do you want to weigh in on this idea?

MS. GODESKY: We'll take a look at 52(b) as well, Your Honor, but I share Mr. Hinderaker's feeling about going around and around in circles on this one, if we can short-cut it and everyone is comfortable with that.

THE COURT: Right. Okay. Well, and that's obviously the intent here, is to be efficient.

All right. One last thing.

I guess we can go off the record on this.

(Off-the-record discussion)

THE COURT: Okay. Anything further, Mr. Hinderaker?

MR. HINDERAKER: No, Your Honor.

THE COURT: All right. Ms. Godesky, anything further?

MS. GODESKY: No thank you.

THE COURT: All right. Thank you, everyone. We're in recess.

(Court adjourned at 2:28 p.m., 05-24-2023.)

* * *

I, Renee A. Rogge, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR